Office-Supreme Court, U.S.
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FEB 5 1981
ALEXANDER L. STEVAS,
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80-1325

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE LEIGHTON DAHL,

Petitioner,

v.

TED M. AKIN and GLORIA DAHL AKIN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONER

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QUESTION PRESENTED

Petitioner, hereinafter called "Dahl", is an elderly Texas widower who planned to remarry. The Respondents, hereinafter called the "the Akins", are Mr. Dahl's daughter and son-in-law, both of whom vehemently opposed Dahl's remarriage, fearing diversion of his estate. When the Akins' remonstrances failed to dissuade Dahl from remarrying, the Akins resorted to two unconstitutional Texas statutes — the Texas Probate Code, §131(b) (Vernon 1956) and the Texas Mental Health Code. Tex. Rev. Civ. Stat. Ann. art. 5547-27 (Vernon Supp. 1980). By means of false ex parte representations, the Akins persuaded Texas courts to appoint Gloria Akin as guardian of Dahl's person and estate and to institutionalize Mr. Dahl in a mental hospital. Based upon the false, ex parte representations, the Akins gained control of Mr. Dahl's person and estate and had him incarcerated in a mental institution. The Akins accomplished this by means of the Texas Probate Code, the Texas Mental Health Code, two Texas courts, two Texas judges, and Texas peace officers. Thus, between the Akins and the overt involvement of Texas public officials, Mr. Dahl was deprived of his liberty and property without due process of law. The question presented to this Court is whether or not the Akins were acting under color of state law under 42 U.S.C. §1983.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are as follows:

1. George Leighton Dahl
2. Ted M. Akin
3. Gloria Dahl Akin

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BRIEF FOR PETITIONER

To the Supreme Court of the United States:

OPINION BELOW

There was no formal opinion of the district court. The opinion of the Fifth Circuit is reported at 630 F.2d 277. It is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the court of appeals (Appendix page A 1) was entered on November 10, 1980. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. §1983 (West 1974) provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Dahl brought suit against the Akins in the United States District Court for the Northern District of Texas, asserting a damage action against them under 42 U.S.C. §1983, with jurisdiction being based upon 28 U.S.C. §1331 and §1343. On the Akins' motion, the district court dismissed Dahl's complaint on the ground that the Akins had not acted under color of state law. The United States Court of Appeals for the Fifth Circuit affirmed. Since the question presented is whether or not the Akins acted under color of state law, the following summary is appropriate.

In order to prevent Dahl's remarriage, the Akins instituted two separate and distinct court actions in the State of Texas, the state of Dahl's residence. First, the Akins succeeded in having Gloria Akin appointed the guardian of Mr. Dahl's person and estate, pursuant to the Texas Probate Code, §131(b). This was done ex parte and, based upon the false representations of the Akins, Gloria Akin was appointed temporary guardian of the person and estate of George Leighton Dahl by the Probate Court of Dallas County, Texas. §131 of the Texas Probate Code

permits this to be done ex parte, and it does not require that there ever be a hearing. If the application is not contested, the court can turn the temporary guardianship into a permanent one.

The Akins then instituted a second court action to have Dahl temporarily committed to a mental hospital. Based upon the false representations of the Akins, Joseph E. Ashmore, Judge of the Mental Illness Court of Dallas County, Texas, issued a writ to bring about the arrest and incarceration of Dahl in the psychiatric ward of Presbyterian Hospital in Dallas County, Texas.

Based upon the two foregoing proceedings, the Akins were able to have Dahl confined and incarcerated in a mental institution in Dallas County, Texas, where he remained for seventeen days; and the Akins gained total and complete control of Dahl's person and estate. All of this was accomplished by the Akins, with the aid of the Texas Probate Code, the Texas Mental Health Code, the Probate Court of Dallas County, Texas, the Mental Illness Court of Dallas County, Texas, and peace officers of the State of Texas. As a result of the Akins' actions, the courts issued certain papers and writs; and as a result of the papers and writs, the property and person of Dahl were seized and impounded without hearing, or an opportunity to be heard, by the affirmative requirements of the law of Texas.

ARGUMENT

The case involves the application of the Civil Rights Act of 1871. The Fifth Circuit Court of Appeals found that Dahl had been deprived of liberty and property without due process of law and that the State of Texas was involved in such deprivation. However, it held that Mr. Dahl had no cause of action for damages against the persons who set the state into action against him — the Akins. The opinion and judgment of the Fifth Circuit

seriously erodes the purpose of the 1871 Civil Rights Statute — preservation of human liberty and human rights. The 1871 statute aids that preservation by securing to those who are deprived of their liberty and rights a damage action against the offending party. The damages remedy is a vital component of any scheme for vindicating the deprivation of such constitutional guarantees. Dahl was deprived of these guarantees by the Akins, who, with knowledge of and pursuant to, the Texas Probate Code and the Texas Mental Health Code, set into action the State of Texas which, at the affirmative command of Texas statutes, placed control of Mr. Dahl's person and estate in the hands of the Akins and which deposited Mr. Dahl in a mental institution. Thus, without question, Dahl was deprived of his constitutional guarantees of liberty and property; however, the Court of Appeals denied him a damage action for such deprivation.*

In a nutshell, the Court of Appeals has held that:

1. Dahl was deprived of liberty and property without due process of law.

2. The State of Texas was involved in such deprivation.

3. The Texas Probate Code and the Texas Mental Health Code are unconstitutional, at least to the extent that they permitted deprivation of Dahl's constitutional guarantees.

4. The Akins caused the State of Texas to take the steps that deprived Dahl of his constitutional guarantees.

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*Of course, the state judges would have absolute immunity in the damage action, and the peace officers would have, at least, a qualified immunity. However, the Akins have no immunity. *Dennis v. Sparks* .... U.S..... ,101 S. Ct. 183 (1980).

5. However, Dahl has no damage remedy against the Akins because the Akins did not act "under color of state law," which the Court of Appeals understood to mean that the Akins' actions must be attributable to the State of Texas, it not being enough that the Akins acted with knowledge of and pursuant to the Texas statutes.

In arriving at its decision, the Court of Appeals has rendered a decision in conflict with decisions of this Court and with decisions of the Second Circuit and with decisions within its own circuit.

In order to state a cause of action under 42 U.S.C. §1983, a plaintiff must prove that the defendant deprived him of rights secured by the Constitution and laws of the United States and that such deprivation was under color of any statute, ordinance, regulation, custom, or usage of any State or Territory. *Adickes v. Kress & Co.*, 398 U.S. 144, 150 (1970). In that case, this Court held that proof of those two elements entitled a damage recovery against a private individual causing such deprivation. The Court defined under color of state law as follows:

> "Whatever else may also be necessary to show that a person has acted under color of state law for the purposes of §1983, we think it essential that he acted with knowledge of and pursuant to that statute." *Id.* at 162 n.23.

In this Court's latest pronouncement of what constitutes action under color of state law, the Court has reaffirmed the above holding in *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149,156 (1978). In that case, the plaintiff asserted a damage action under 42 U.S.C. §1983 based upon a proposed sale of goods entrusted to a warehouseman pursuant to the New York Uniform Commercial Code. This Court held that the complaint could fairly be read to allege knowledge on the part of the

defendants, inasmuch as the defendants had taken steps under the Uniform Commercial Code to sell the property.

However, the Court did not feel that the first of the two elements of an action under §1983 was present — deprivation of the rights secured by the Constitution and laws of the United States, to wit: state action. In order to prove such a deprivation, the Court held that the plaintiff, in the absence of overt official involvement, must show that Flagg Brothers not only acted under color of the challenged statute, but also that its actions were properly attributable to the State of New York. The Court found that their actions were not.

The Court was of the opinion that the overt involvement of state officials supplies the necessary state action. In this regard, this Court stated as follows:

> "It must be noted that respondents have named no public officials as defendants in this action. The City Marshal, who supervised their evictions, was dismissed from the case by consent of all parties. The total absence of overt official involvement plainly distinguishes this case from earlier decisions imposing procedural restrictions on creditor's remedies such as *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751, (1975); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556, (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349, (1969). *Id* at 1734.

In each of the foregoing cases cited by the Supreme Court in the *Flagg* case, there was a summary seizure of property by a state official who was set into action by a private individual. In each of the cases, state officials, at the instance and request of

creditors, seized property* of debtors without prior notice or hearing, on the strength of conclusory affidavits filed by the creditors. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975), (pre-judgment garnishment without hearing); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (pre-judgment replevin without notice or hearing); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (pre-judgment garnishment without notice or hearing). In each of the foregoing cases, the state action was overt as it is in this case.

In the *Flagg* case, this Court was careful to distinguish the facts before it from those in the foregoing creditors' cases:

> "This situation is clearly distinguishable from cases such as *North Georgia Finishing*, supra; *Fuentes*, supra, and *Sniadach*, supra. In each of those cases a government official participated in the physical deprivation of what had concededly been the constitutional plaintiff's property under state law before the deprivation occurred. The constitutional protection attaches not because, as in *North Georgia Finishing*, a clerk issued a ministerial writ out of the court, but because as a result of that writ the property of the debtor was seized and impounded by the affirmative command of the law of Georgia. The creditor in *North Georgia Finishing* had not simply sought to pursue the collection of his debt by private means permissible under Georgia law; he had invoked the authority of the Georgia court, which in turn had ordered the garnishee not to pay over money which previously had been the property of the debtor. See *Virginia v. Rives*, 100 U.S. 313, 318, 25 L.Ed. 667 (1879); *Shelley v. Kraemer*, 334 U.S. 1, 63 S. Ct. 836, 92 L.Ed. 1161 (1948). *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 157, 160, n. 10 (1978).

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*42 U.S.C. §1983 protects individuals from deprivation of property, as well as liberty, without due process. *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972).

It is submitted that the facts of this case are indistinguishable from those of the creditor cases. In this case, government officials participated in the deprivation of Mr. Dahl's liberty and property, both of which had been his before the deprivation occurred. The Akins set into motion the process that caused the issuance of the writs; and as a result of the writs, Mr. Dahl's property was seized and turned over to Gloria Akin, and he was deprived of his personal liberty. The Akins invoked the authority of the Texas courts which in turn ordered Mr. Dahl's property seized and ordered Mr. Dahl incarcerated in a mental institution. Thus, the requirement of state action is met by the overt involvement of state officials, leaving the second element — action under color of state law.

It is upon the second element of a §1983 action that the Fifth Circuit erred, by misinterpretation of this Court's opinion in *Flagg Brothers*. The inquiry that this Court made in *Flagg Brothers* was as to the first element that a §1983 plaintiff must prove — deprivation of a right secured by the Constitution and the laws of the United States — in other words, the meaning of state action as that term is associated with the Fourteenth Amendment. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The Fifth Circuit found that Dahl's complaint properly alleged state deprivation of liberty and property without due process of law. 630 F. 2d 277, 280. However, a reading of the Fifth Circuit's opinion shows that it went on to impose requirements upon the second element of the §1983 action beyond any ever imposed by this Court.

The Fifth Circuit's opinion imposes the following burden on a §1983 plaintiff seeking recovery against a private individual — there must have been a deprivation of a right secured by the Constitution and laws of the United States (state action) and, irrespective of involvement of public officials, it must be shown that the private individual was, in essence, clothed with such

authority to make him tantamount to a state official by making the plaintiff prove that the defendant's acts were properly attributable to the state. However, this is the burden imposed by this Court in *Flagg Brothers* for a showing of state action in those instances where there is a complete lack of overt official involvement. It is submitted that this holding is in direct conflict with the holding of this Court in *Flagg Brothers, Fuentes, Sniadach* and *North Georgia Finishing*. In all those cases, the Court required that there be a showing of state action. State action was found in those instances where there was overt official involvement in the case. The Fifth Circuit has doubled the plaintiff's burden by requiring that there be both overt involvement of public officials and acts by the defendant attributable to the state, when, in fact, the requirement of action under color of state law is satisfied by showing that the defendant acted with knowledge of and pursuant to the state law.

The holding of the Fifth Circuit is also in direct conflict with *Dieffenbach v. Attorney General of Vermont, et al*, 604 F. 2d 187 (2d Cir. 1979) and *United States v. Wiseman*, 445 F. 2d 792 (2d Cir. 1971), cert. den. 404 U.S. 967. In *Dieffenbach*, the appellant challenged Vermont's strict foreclosure law. The defendant bank had foreclosed upon a piece of property belonging to the appellant, pursuant to Vermont foreclosure statutes. These statutes directly engaged the state's judicial power in effectuating foreclosure by, among other things, requiring a mortgagee to go to court to obtain a decree of foreclosure. Additionally, the mortgagee was required to obtain a writ of possession from the court clerk and to gain possession of the property, the mortgagee was required to have a sheriff execute upon the writ. The defendant bank and the defendant bank officer, both private citizens, moved to dismiss the appeal on the ground that the strict foreclosure of the appellant's property would not constitute state action, thus depriving the court of subject matter jurisdiction.

In declining to do so, the Court found the requisite state action, and in discussing *Flagg Brothers,* the Court held as follows:

> . . . the Supreme Court evidently requires us to determine initially whether there is 'overt official involvement.' In *Fuentes,* for example, as in *Flagg Brothers,* the state law allowing for ex parte prejudgment replevin had been incorporated into the contract between debtor and creditor but, unlike *Flagg Brothers,* a clerk was required, at the creditor's request, to make out the writ of replevin pursuant to which the sheriff seized the property. Similarly, in *Sniadach* the statute required the clerk of the court to issue the summons at the request of a creditor's lawyer and in *North Georgia Finishing* the court issued the writ of garnishment based solely on an affidavit of the creditor. Although this seems to be a somewhat arbitrary method of differentiation we are bound to apply it. Here, although the private mortgage deed in effect incorporates the Vermont law of foreclosure, the law does require a mortgagee to go to court to obtain a decree of foreclosure, which the creditor then must record. The court or the clerk may render an accounting and the court has discretionary power to extend or limit the statutory period of redemption that follows the decree. Indeed, to obtain possession after the equity of redemption has expired the creditor must obtain from the clerk of the court a writ of possession which the sheriff must execute. Unlike the procedures in other states for non-judicial foreclosure under private power of sale, Vermont's strict foreclosure laws directly engage the state's judicial power in effectuating foreclosure. These official acts are certainly sufficient to give us jurisdiction over the appellant's claim that the strict foreclosure laws of Vermont are unconstitutional." *Id.* at 194.

The opinion of the Second Circuit emphasizes that *Flagg Brothers* dealt with the requirement of state action and not with the imposition of some additional standard upon action under color of state law, as the Fifth Circuit believed.

The case of *United States v. Wiseman*, 445 F.2d 792 (2d Cir. 1971), cert. den. 404 U.S. 967, involved an appeal from a conviction under 18 U.S.C. §242 and 18 U.S.C. §2 which are the criminal counterparts to 42 U.S.C. §1983. 18 U.S.C. §2 states whoever causes an act to be done, which if directly performed by another, would be an offense against the United States is punishable as a principal. 42 U.S.C. §1983 imposes liability for subjecting the person or causing the person to be subjected to a deprivation of rights, privileges and immunities secured by the Constitution and laws of the United States.

In *Wiseman*, the defendants (private process servers) were charged with filing false affidavits of service of process with a court clerk, who in turn entered default judgments, pursuant to which executions were issued, thereby depriving innocent persons of due process. The Second Circuit found that the defendants were acting under color of law pursuant to 18 U.S.C. §242, without regard to whether the clerk knowingly participated with the defendants. The actions of the defendants in *Wiseman* are practically identical to the actions of the Akins in this case. It would be an incongruous result if the Akins could be found guilty of a crime by depriving Dahl of his constitutional rights and yet escape civil liability to him for the same action, since the proof required under 18 U.S.C. §242 is same as is required under 42 U.S.C. §1983. *Dennis v. Sparks*, ... U.S. .... , 101 S. Ct. 183, 187, n. 5 (1980).

Finally, the Court of Appeals' opinion is in direct conflict with *Henry v. First National Bank of Clarksdale*, 595 F. 2d 291 (5th Circuit 1979), cert. den. 444 U.S. 1074. In that case, the Fifth

Circuit found the requisite state action under 42 U.S.C. §1983 where a private party had procured a money judgment and was able to enlist the power of the state on his behalf in enforcing the judgment, as opposed to the situation where the court is merely a forum for the resolution of private disputes. The Texas Probate Code and the Texas Mental Health Code permit a private litigant to enlist the power of the state, ex parte, on his behalf in enforcing an order of temporary guardianship or an order of commitment. Indeed, §131 of the Texas Probate Code does not require that there ever be a hearing on permanent guardianship and permits the court to turn a temporary guardianship into a permanent one, without hearing. Thus, an order of temporary guardianship is tantamount to a final judgment under Texas law. When played hand in glove with the Mental Health Code, by confining a person in a mental institution, without a hearing or the right of a phone call, the temporary guardianship would become permanent in every case. Thus, the machinery of the Texas Probate Code and the Texas Mental Health Code provide the requisite state action, inasmuch as the Akins were able to enlist the full power of the state on their behalf in depriving Mr. Dahl of his liberty and property.

In its opinion in this case, the Fifth Circuit states that the *Henry* Court confused the state action requirement with that of color of state law. However, Dahl submits that it is the *Dahl* Court that has confused the two.

The Fifth Circuit has badly misinterpreted this Court's opinion in *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978). First, the Fifth Circuit has interpreted the burden under §1983 to be that not only must a §1983 plaintiff show overt official involvement, but also that the defendant's actions are properly attributable to the state. In fact, this Court has held under color of state law to mean that the defendant acted with knowledge of and pursuant to the state law. However, this Court has correctly

held that in order to prove the first element of a cause of action under 42 U.S.C. §1983 the plaintiff must show deprivation of a right secured by the Constitution and the laws of the United States, to wit — state action; and, in order to impose liability upon the private defendant under §1983, there must be overt official involvement, or in its absence, state action can be found only if the acts of private parties could properly be attributed to the state. *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 157 (1978). Thus, the Fifth Circuit's decision, if allowed to stand, would not permit an action for recovery of damages from a private individual under §1983 unless the plaintiff could prove both concepts of state action. It would prohibit any cause of action against a private individual jointly engaged with state officials, see *Adickes v. Kress & Co.,* 398 U.S. 144 (1970); *United States v. Price,* 383 U.S. 787 (1966); and any action against a private individual who brings about the constitutional deprivation through overt official involvement in the case, *North Georgia Finishing, Inc. v. Di-Chem, Inc.* 419 U.S. 601; *Fuentes v. Shevin,* 407 U.S. 67 (1972); and *Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969) unless the plaintiff could, in each instance, also prove that the defendant's actions were properly attributable to the state.

Thus, the Fifth Circuit has imposed requirements upon the second element of a §1983 action beyond any ever imposed by this Court. In effect, the Fifth Circuit has doubled a plaintiff's burden of proof by requiring that there be both overt involvement of public officials and by requiring that the defendant's acts be attributable to the state, thereby making the defendant tantamount to a public official. The Fifth Circuit's opinion seriously erodes the rights of a §1983 plaintiff to seek and secure damages against those who violate his constitutional guarantees. Since most public officials enjoy an absolute or qualified immunity, it would appear that the damages remedy would often be directed toward a private individual. However, the Fifth

Circuit now makes it twice as difficult to prove a damage action against a private individual. This flies directly in the face of the purpose of §1983, which is to aid in the preservation of human liberty and rights. At the heart of §1983 is a damage remedy. It is a vital component of any scheme for vindicating cherished constitutional guarantees. *Owen v. City of Independence, Mo.*, ... U.S. .... , 100 S. Ct. 1392, 1415 (1980). §1983 is to be construed generously in order to further its primary purpose. *Id.* at 1407-1408; *Gomez v. Toledo*, ... U.S. .... , 100 S. Ct. 1920, 1923 (1980). Despite this Court's instruction to generously construe §1983, the Fifth Circuit's opinion has imposed a quite narrow construction upon §1983; and, in fact, its opinion unduly restricts the scope of §1983 and unduly restricts a litigant's right of a damage action against a private individual causing the deprivation of constitutional guarantees.

CONCLUSION

For each and every of the foregoing reasons, Dahl respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on the 10th day of November, 1980.

Respectfully submitted,

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PROOF OF SERVICE

I, Thomas L. Case, one of the counsel for petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that I hand delivered three copies of the foregoing Brief for Petitioner on the 6th day of February, 1981 to Paul D. Schoonover, Esq. of Vial, Hamilton, Koch, Tubb, Knox & Stradley, 15th Floor, Republic National Bank Tower, Dallas, Texas.

/s/ THOMAS L. CASE

Thomas L. Case

APPENDIX

George Leighton DAHL,
Plaintiff-Appellant,

v.

Gloria Dahl AKIN and Ted M. Akin,
Defendants-Appellees.

No. 79-1409.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

November 10, 1980.

In a civil rights action brought by a father against his daughter and her husband, the complaint was dismissed, on defendants' motion, by the United States District Court for the Northern District of Texas at Dallas, Robert M. Hill, J. On appeal by the plaintiff father, the Court of Appeals, James C. Hill, Circuit Judge, held that allegations that the daughter and her husband through court proceedings and in deprivation of due process secured plaintiff's confinement in mental hospital did not allege conduct taken "under color of" state law, and thus did not state claim for relief under 1871 civil rights statute, despite contention that daughter initiated commitment proceedings in her official capacity as state-appointed guardian.

Affirmed.

1. Civil Rights — 13.12(7)

In determining whether plaintiff stated claim cognizable under 1871 civil rights statute, it was necessary to inquire first whether plaintiff had been deprived of rights secured by Constitution and laws and, in order to determine whether rights were "secured by" Fourteenth Amendment, to find allegation that state was "involved in" their deprivation. 42 U.S.C.A. §1983; U.S.C.A.Const. Amends. 14, 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

2. Civil Rights — 13.5(2)

Whatever other judicial action may constitute "state action," for purposes of alleging constitutional deprivation in claim for relief under 1871 civil rights statute, failure of procedural due process does. 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

3. Civil Rights — 13.12(3)

"Procedure" constitutes inherently judicial responsibility, and complaint that plaintiff's daughter and her husband had secured plaintiff's confinement in mental hospital through court proceedings by which plaintiff was deprived of due process was sufficient to allege state deprivation of liberty and property without due process of law, for purposes of stating claim for relief under 1871 civil rights statute, through it yet remained to be determined whether constitutional injury had been caused by persons acting "under color of" state law. 42 U.S.C.A. §1983; U.S.C.A.Const. Amend. 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.; Vernon's Ann.Civ.St. arts. 5547-27, 5547-31, 5547-33; V.A.T.S. Probate Code, §131(b).

4. Civil Rights — 13.5(1)

The 1871 civil rights statute does not reach all constitutional injuries but only those caused by persons acting "under color of" state law. 42 U.S.C.A. §1983.

5. Civil Rights — 13.5(1)

Phrase "under color of" state law has secondary usage, not coterminous with "state action," defining character of conduct proscribed, within purview of 1871 civil rights statute. 42 U.S.C.A. §1983.

See publication Words and Phrases for other judicial constructions and definitions.

6. Civil Rights — 13.12(8)

Allegations that plaintiff's daughter and her husband through court proceedings and in deprivation of due process secured plaintiff's confinement in mental hospital did not allege conduct taken "under color of" state law, and thus did not state claim for relief under 1871 civil rights statute, despite contention that daughter initiated commitment proceedings in her official capacity as state-appointed guardian. 42 U.S.C.A. §1983; U.S.C.A.Const. Amends. 14, 14, §1; Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.; Vernon's Ann.Civ.St. arts. 5547-27, 5547-31, 5547-33; V.A.T.S. Probate Code, §131(b).

7. Courts — 90(1)

One panel cannot overrule another.

Thomas L. Case, Louis P. Bickel, Dallas, Tex., for plaintiff-appellant.

Vial, Hamilton, Koch, Tubb, Knox & Stradley, Paul D. Schoonover, Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

JAMES C. HILL, Circuit Judge:

George L. Dahl, an elderly Texas widower, planned to remarry.[1] Dahl's daughter Gloria, fearing diversion of her father's estate, resolved to stop his remarriage. When filial remonstrances failed, Gloria resorted to the Texas courts. First, by means of false, ex parte representations that her father was incompetent, Gloria succeeded in having herself appointed his guardian. Tex.Prob.Code Ann. §131(b) (Vernon 1956). Second, again by means of false, ex parte representations, Gloria persuaded the Texas Mental Illness Court to issue a writ directing that her father be institutionalized forthwith. Tex.Rev.Civ.Stat.Ann. art. 5547-27 (Vernon Supp.1980). Thus armed with less process than would be necessary to seize a refrigerator, *see North Georgia Finishing, Inc. v. Di—Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975), Texas peace officers dragged Dahl from his home and deposited him with Presbyterian Hospital in Dallas.

While her father was thus incarcerated, Gloria persuaded the Probate Court to permit her, as guardian, to take over his

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[1] Our recitation of facts derives from the plaintiff's complaint. Since the district court dismissed pursuant to Fed.R.Civ.P. 12(b)(6), we present the plaintiff's conception of the case as if it were true. *E.g., Miree v. DeKalb County*, 433 U.S. 25, 27 n.2, 97 S.Ct. 2490, 2492, 53 L.Ed.2d 557 (1977); *Walker Process Equipment, Inc., v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75, 86 S.Ct. 347, 348-349, 15 L.Ed.2d 247 (1965).

residence. Meanwhile, in the Mental Illness Court, Gloria applied for "temporary hospitalization." Tex.Rev.Civ.Stat.Ann. art. 5547-31 (Vernon Supp.1980). To forestall a contest of that proceeding, she purported to waive, as guardian, personal notice to her father. Tex.Rev.Civ.Stat.Ann. art. 5547-33 (Vernon 1956). Fortunately for Dahl, who might otherwise be incarcerated to this day, certain of his acquaintances happened to see him being taken away and notified his attorneys. The scheme exposed, Dahl's attorneys secured both dismissal of the hospitalization proceedings and Dahl's release, following sixteen days of involuntary confinement. Approximately one month later, when a jury found that Dahl was competent, Gloria's guardianship also was dissolved.

For redress against his daughter, Dahl sought damages under 42 U.S.C.A. §1983 (West 1974)[2] and pendent Texas forms of action. In brief, Dahl charged that Gloria and her husband had caused him to be deprived of liberty and property without due process of law. U.S.Const. amend. XIV, §1, *construed in Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). To this was joined the familiar litany of state law torts, *i.e.*, abuse of process, false arrest, false imprisonment and malicious prosecution. On defendants' motion, the district court dismissed Dahl's complaint, Fed.R.Civ.P. 12(b)(6), on the statutory ground that defendants had not acted "under color of" state law. 42 U.S.C.A. §1983 (West 1974). Dahl appeals.

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[2] 42 U.S.C.A. §1983 (West 1974) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[1-3] In determining whether Dahl has stated a claim cognizable under §1983, "[t]he first inquiry . . . is whether [he has alleged] . . . depri[vation] of a right 'secured by the Constitution and laws.' " *Martinez v. California*, 444 U.S. 277, 284, 100 S.Ct. 553, 588, 62 L.Ed.2d 481 (1980), quoting *Baker v. McCollan*, 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). There can be no question, *compare Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), but that Dahl's complaint implicates a "liberty" interest of constitutional magnitude. *See Addington v. Texas*, 441 U.S. 413, 425, 99 S.Ct. 1804, 1809, 60 L.Ed.2d 323 (1979). Nor have we any trouble finding alleged injury to a constitutionally significant "property" interest. *E.g., Barry v. Barchi*, 443 U.S. 55, 64, n.11, 99 S.Ct. 2642, 2649, 61 L.Ed.2d 365 (1979); *Memphis Light, Gas & Water Divisions v. Craft*, 436 U.S. 1, 11-12, 98 S.Ct. 1554, 1561, 56 L.Ed.2d 30 (1978). Matters concerning the deprivation of liberty and property without due process of law are governed by the Fourteenth Amendment and the Fourteenth Amendment protects only against state action. *Civil Rights Cases*, 109 U.S. 3, 3 S.Ct. 18, 27 L.Ed. 835 (1883). Thus, before we can conclude that Dahl invokes rights "secured by" that amendment, we must also find an allegation that Texas was "involved in" their deprivation. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722, 81 S.Ct. 856, 860, 6 L.Ed.2d 45 (1961). *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 157, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185 (1978).

At first blush, the requisite "state action" would here seem obvious. A Texas judge ordered Dahl stripped of control over all of his property; another Texas judge directed that Dahl be taken from his home and placed in a mental institution. But while such judicial action can constitute "state action" under the Fourteenth Amendment, *see Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 178-79, 92 S.Ct. 1965, 1974, 32 L.Ed.2d 627 (1972); *Shelley v. Kraemer*, 334 U.S. 1, 20, 68 S.Ct. 836, 845, 92 L.Ed. 1161

(1948), it has never been held that all state court litigation must therefore result in dispositions that, if undertaken by state agents, would be constitutional. *See Bell v. Maryland*, 378 U.S. 226, 232, 84 S.Ct. 1814, 1818, 12 L.Ed.2d 822 (1964) (Black, J., dissenting); *Lombard v. Louisiana*, 373 U.S. 267,274, 83 S.Ct. 1122, 1125, 10 L.Ed.2d 338 (1963) (Douglas, J., concurring). To suggest otherwise would mean the end, save for those capable of self-help, of personal freedom "to be irrational, arbitrary, capricious, [or] even unjust." *Peterson v. City of Greenville*, 373 U.S. 244, 250, 83 S.Ct. 1119, 1133, 10 L.Ed.2d 323 (1963) (Harlan, J., concurring). Precisely when, as in *Shelley*, judicial involvement in private litigation assumes constitutional dimensions is a problem that has perplexed courts and scholars for decades. *See generally* W. Lockhart, Y. Kamsar, J. Chopper, Constitutional Law 1411-17 (4th ed. 1975). This case demands no definitive answer. It is enough to hold that, whatever other judicial action may constitute "state action," *cf. Henry v. First National Bank*, 595 F.2d 291 (5th Cir. 1979), a failure of procedural due process surely does.

It would be sufficient, to support this conclusion, merely to cite any number of Supreme Court cases that have so assumed. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). We wish to emphasize, however, what is for us the essential fact that "procedure" constitutes an inherently judicial responsibility. *Cf. Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Notice, hearings, trial conduct — these are matters in respect of which courts are the principal, and often the only, state actors. *Cf. Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Although the Texas courts here purported merely to follow statutes, we think that the procedural nature of Dahl's claims

sets this case apart from those in which state courts are accused merely of enforcing substantive rights. *Compare District 28, United States Mine Workers v. Wellmore Coal Corp.*, 609 F.2d 1083 (4th Cir. 1979); *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974, 96 S.Ct. 2173, 48 L.Ed.2d 798 (1976); *Hardy v. Gissendaner*, 508 F.2d 1207 (5th Cir. 1975); *McGuane v. Chenango Court, Inc.*, 431 F.2d 1189 (2d Cir. 1970), *cert. denied*, 401 U.S. 994, 91 S.Ct. 1238, 28 L.Ed.2d 532 (1971); *Brown v. Dunne*, 409 F.2d 341 (7th Cir. 1969). Contrary to the results in these cases, we find that Dahl's complaint properly alleges state deprivation of liberty and property without due process of law, freedom from which constitutes a right "secured by the Constitution and laws." 42 U.S.C.A. §1983 (West 1974).

[4,5] The preceding conclusion does not end our inquiry, for the same reason that the "attachment" cases, *e.g., North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed.2d 751 (1975); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969), do not. Section 1983 does not reach all constitutional injuries, but only those caused by persons acting "under color of" state law. The question remains, therefore, whether appellees' conduct can be so characterized. Preliminarily, we note that the phrase — "under color of" — has acquired two distinct usages, only one of which is relevant here. Most commonly, courts have equated "under color of" state law with the concept of "state action" under the Fourteenth Amendment. *See, e.g., United States v. Price*, 383 U.S. 787, 794, n.7, 86 S.Ct. 1152, 1156, 16 L.Ed.2d 267 (1966); *Tongol v. Usery*, 601 F.2d 1091, 1097 (9th Cir. 1979); *Braden v. University of Pittsburgh*, 552 F.2d 948, 955 n.34 (3d Cir. 1977) (en banc); *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642n.3 (4th Cir. 1975); *Parish v. National Collegiate Athletic Association*, 506 F.2d 1028, 1031 n.6 (5th Cir. 1975);

Shirley v. State National Bank, 493 F.2d 739, 741 (2d Cir.), *cert. denied*, 419 U.S. 1009, 95 S.Ct. 329, 42 L.Ed.2d 284 (1974). This interpretation is apposite to finding state involvement, *see Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 174 n.44, 90 S.Ct. 1598, 1617, 26 L.Ed.2d 142 (1970); *Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 982-83 (5th Cir. 1979) (en banc), *cert denied*, ... U.S. ....., 100 S.Ct. 1339, 63 L.Ed.2d 777 (1980), or state function, *see Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974); *Central Hardware Co. v. NLRB*, 407 U.S. 539, 547, 92 S.Ct. 2238, 2243, 33 L.Ed.2d 122 (1972), in ostensibly private conduct. It is clear, however, that "under color of" state law has a secondary usage, not coterminous with "state action," defining the character of the conduct proscribed. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155-56, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978); *Lavoie v. Bigwood*, 457 F.2d 7, 15 (1st Cir. 1972). It is this secondary usage, in light of the "state action" to which appellees unquestionably caused Dahl to be subjected, that concerns us here.

[6,7] Appellees are accused, in substance, of initiating lawsuits in bad faith. We may assume, arguendo, that their actions were tortious at state law. That would still be far removed from "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941). *Cf. Williams v. Kelley*, 624 F.2d 695 (5th Cir. 1980) ("the sort of abuse of government power that is necessary to raise an ordinary tort by a government official to the statute of a violation of the Constitution"). It is not enough, where the state in no way compelled appellees' actions, *cf. Peterson v. City of Greenville*, 373 U.S. 244, 250-53, 83 S.Ct. 1119, 1134-1135, 10 L.Ed.2d 323 (1963) (Harlan, J. concurring), that they acted "with knowledge of and pursuant to" Texas statutes. *Flagg Bros., supra*, 436 U.S. at 156, 98 S.Ct. at 1733,

quoting *Adickes, supra*, 398 U.S. at 162 n.23, 90 S.Ct. at 1611 (Harlan, J.). "[U]nder 'color' of law means under 'pretense' of law." *Screws v. United States*, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040, 89 L.Ed. 1495 (1945) (plurality opinion), quoted in *Baldwin v. Morgan*, 251 F.2d 780, 786-87 (5th Cir. 1958). About the plaintiff, prosecution of a private lawsuit implies no "authority" or "pretense" beyond the First Amendment right of petition. *Cf. California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972). It follows that appellees' conduct, as alleged, was not taken "under color of" state law.[3]

See Torres v. First State Bank, 588 F.2d 1322, 1325-27 (10th Cir. 1978); *Wartman v. County Court*, 510 F.2d 130, 134 (7th Cir. 1975); *Sykes v. California*, 497 F.2d 197, 202 n.13 (9th Cir. 1974); *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974) (per curiam), *overruled on other grounds, Sparks v. Duval County Ranch Co.*, 604 F.2d 976, 63 L.Ed.2d 777 (5th Cir. 1979) (en banc), *cert. denied*, ... U.S. ....., 100 S.Ct. 1339 (1980); *Antelman v. Lewis*, 480 F.Supp. 180, 185 (D.Mass.1979).[4]

AFFIRMED.

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[3] Appellant argued that appellee initiated the commitment proceedings in her official capacity as state-appointed guardian, and thus acted "under color of" law. Factually, it is impossible to determine whether Mrs. Akin acted as guardian or a private citizen and relative when she proceeded against her father; she can claim either status. It is clear, however, that Tex.Rev.Civ.Stat.Ann. art. 5547-31 allows "any adult person" to initiate a commitment proceeding in Texas. Thus it cannot be assumed that Mrs. Akin acted in any official capacity.

[4] *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), involving provisional remedies, is not to the contrary. *Fuentes* was brought, not solely against a private state court litigant, but against the Florida Attorney General to enjoin enforcement of a statute. *Henry v. First National Bank*, 595 F.2d 291 (5th Cir. 1979), which enjoined enforcement of a private judgment, apparently is contrary both to our holding and to that in *Hill v. McClellan*,

supra, 490 F.2d at 860. *Henry* is not controlling, however, for at least three reasons: First, *Henry* did not adjudicate the merits of whether a §1983 suit would lie against private state court litigants, but merely whether there was sufficient merit to support a preliminary injunction. Second, *Henry* contains no discussion of whether the defendants were acting "under color of" state law, apparently confusing that requirement with the necessity for "state action." *Cf. Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 155-56, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978). Third, to the extent that it conflicts with *Hill*, *Henry* is simply questionable since, in this Circuit, one panel can not overrule another. *E.g., Carr v. Blazer Financial Services, Inc.*, 598 F.2d 1368, 1370 (5th Cir. 1979); *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972).

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 19

NO. 79-1409

D. C. DOCKET NO. CA-3-78-0611-D

GEORGE LEIGHTON DAHL,

Plaintiff-Appellant,

v.

GLORIA DAHL AKIN and TED M. AKIN,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before HILL, RUBIN and ANDERSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 10, 1980

Issued as Mandate: December 5, 1980